IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

GEORGIACARRY.ORG, INC., *et.al.,*	)	
Plaintiffs,	)	CIVIL ACTION NO. 5:10-CV-302-CAR
v.	)	
STATE OF GEORGIA,*et.al.,*	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

"Legislation that regulates church administration, [or] the operation of the churches … prohibits the free exercise of religion." *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000).

Introduction

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of O.C.G.A. § 16-11-127(b)(4), which criminalizes the carrying of firearms in "places of worship" (the "Church Carry Ban"). Because the Church Carry

Ban infringes on both the Free Exercise Clause of the First Amendment and the Second Amendment as a whole, the statute is unconstitutional on its face. The Church Carry Ban also infringes on the specific rights of Plaintiffs, so it is unconstitutional as applied to them. Plaintiffs are entitled to a preliminary injunction to prohibit enforcement of the Church Carry Ban while this action is pending because two distinct fundamental constitutional rights are being infringed and chilled by the Church Carry Ban.

Factual Background

Plaintiff GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. Its primary mission is to foster the rights of its members to keep and bear arms. The large majority of GCO's members possess valid Georgia weapons carry licenses ("GWLs"), issued pursuant to O.C.G.A. § 16-11-129.[1]

Plaintiff Edward Stone is the former president of GCO and a current member of the GCO board of directors. Stone is a member of GCO, and Stone possesses a valid GWL. Stone regularly attends worship services. While attending such services, Stone would like to carry a firearm for the defense of himself and his family, but he is in fear

[1] Prior to June 4, 2010, GWLs were referred to as Georgia firearms licenses ("GFLs"). For the sake of simplicity, Plaintiffs will use the term GWL to refer to a license regardless of the date of issuance.

of arrest and prosecution for doing so. Stone is a former police officer. During Stone's twelve-year law enforcement career in Georgia, Stone regularly attended worship services and carried a firearm with him while doing so.

Plaintiff Baptist Tabernacle of Thomaston, Georgia, Inc., (the "Tabernacle") is a non-profit corporation organized under the laws of the State of Georgia. The Tabernacle is a religious institution. The Tabernacle owns real property in Thomaston, Georgia, which the Tabernacle uses regularly to conduct religious worship services. The Tabernacle would like to allow certain of its members with GWLs to carry firearms on the Tabernacle's property, but is in fear of arrest and prosecution of those members for doing so.

Plaintiff Jonathan Wilkins is the CEO and pastor of the Tabernacle. Wilkins is a member of GCO and Wilkins possesses a valid GWL. Wilkins regularly conducts religious worship services at the Tabernacle's place of worship in Thomaston, Georgia. While conducting such religious worship services, Wilkins would like to carry a firearm for defense of himself, his family, and his flock, but he is in fear of arrest and prosecution for doing so. Wilkins also has an office in the Tabernacle's building. Wilkins frequently is the only occupant of the building while he is working in his office. Wilkins would like to keep a firearm in his office for self-defense, but he

is in fear of arrest and prosecution for doing so.

Argument

The tests for issuing a preliminary injunction are fourfold: 1) Plaintiffs' have a substantial likelihood of success on the merits; 2) irreparable injury will be suffered unless the injunction issues; 3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants; and 4) if issued, the injunction would not be adverse to the public interest. *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir., *en banc*, 2000). Plaintiffs will show below how each test weighs in Plaintiffs' favor, indicating that the Motion must be granted.

I. Plaintiffs Are Highly Likely to Succeed on the Merits

Plaintiffs' likelihood of success on the merits essentially demonstrates each of the four factors, so the majority of this Brief will be devoted to the merits of Plaintiffs' case (with the remaining factors discussed at the end). Plaintiffs' likelihood of success is all but intuitive. The statutory scheme under attack generally permits certain behavior (carrying firearms) throughout the state. Such behavior is prohibited only in a few places, including places of worship. Thus, the state bans behavior in churches that generally is allowed, indeed "authorized," elsewhere throughout the state. It is difficult to imagine how this structure can pass constitutional muster.

IA. The Church Carry Ban Infringes the Free Exercise of Religion

O.C.G.A. § 16-11-127(b), states, in pertinent part, "A person shall be guilty of carrying a weapon or long gun in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while … in a place of worship."[2] A misdemeanor is punishable by a fine of up to $1,000 or confinement in the county jail for up to 12 months, or both. O.C.G.A. § 17-10-3.

The phrase "place of worship" is not defined in the Church Carry Ban. Courts may resort to the dictionary meanings of words not defined in statutes. *Chambley v. Apple Restaurants*, 223 Ga. App. 498, 556 (1998). A "place" is a "building or locality used for a special purpose." *Webster's New Collegiate Dictionary*. "Worship' is "reverence offered a divine being or supernatural power" or "a form of religious practice with its creed or ritual." *Id.* Putting to two together, a "place of worship" is a "building or locality for the special purpose of religious practice."

The First Amendment provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." The Supreme Court of the United States ruled that the Free Exercise clause of the First

[2] Georgia's law is peculiar. Only three other states categorically ban firearms from places of worship, Mississippi, Arkansas, and North Dakota.

Amendment applies to the states in *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

"[T]he Supreme Court has recognized that government action may burden the free exercise of religion in two ways: by interfering with a believer's ability to observe the commands or practices of his faith, and by encroaching on the ability of a church to manage its internal affairs." *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302 (11th Cir. 2000). The Church Carry Ban burdens free exercise in both ways. First, it interferes with the individual Plaintiffs' abilities to observe their faiths by requiring them to choose between two fundamental constitutional rights. Most faiths believe in regular attendance at places of worship, but Georgia law requires, under threat of a year's incarceration, that Plaintiffs abandon their inherent right to self defense through the most effective means available while observing their faith through regular attendance. Second, it also encroaches on the ability of a church to manage its internal affairs by restricting how a church may provide its internal security when such restrictions are not imposed on other private property owners in the state. Outside of places of worship, other private property owners in Georgia may decide for themselves whether to permit firearms on the premises. Places of worship may not govern their own property in this respect in Georgia.

It does not matter that the issues of church governance at hand are not based on matters of church doctrine or ecclesiastical law. "Legislation that regulates church administration, [or] the operation of the churches … prohibits the free exercise of religion." *Id.* at 1304, *citing Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952).

The standard of review in Free Exercise cases is dependent on the nature of the law in question:

> [A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

"To determine the object of a law, we must begin with the text, for the minimum requirement of neutrality is that a law not discriminate on its face. ***A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.***" *Id.* at 533 [Emphasis supplied]. In *Church of the Lukumi Babalu Aye*, the operative words in the ordinance at issue were

"sacrifice" and "ritual," and the Supreme Court observed that those words had both secular and religious meanings, requiring additional analysis.

In the instant case, however, the analysis is easy. "Place of worship" is clear, unambiguous, and not susceptible of a secular meaning. A building or location for the special purpose of religious practice obviously refers to a religious practice without a secular purpose. The State of Georgia criminalizes otherwise lawful conduct[3] solely because it is taking place in a location specially used by people to practice their religions.

In order to pass constitutional muster, a statute must have as "its principle or primary effect … one that neither advances nor inhibits religion." *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). Because the Church Carry Ban is pointed directly at religious institutions ("places of worship") and at no others, it serves no other purpose than to inhibit religion.

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[3] Carrying firearms is prohibited in Georgia even with the property owner's permission only in seven other places besides "places of worship": government buildings, courthouses, jails and prisons, state mental health facilities, nuclear power facilities, polling places, and schools. O.C.G.A. § 16-11-127 (b) and O.C.G.A. § 16-11-127.1. Other than places of worship, and perhaps some nuclear power facilities, none of these locations are private property. A person with a Georgia weapons carry license ("GWCL") may carry a firearm with impunity in every other place in the state. O.C.G.A. § 16-11-127(c) ("authorized to carry a weapon . . . in every location in this state").

A statute also must avoid excessive entanglement between church and state. *Lemon v. Kurtzman,* 403 U.S. 602, 619 (1971). That means that state surveillance of churches must be avoided because it gives rise to entanglements between church and state. *Id.* In order to enforce the Church Carry Ban, however, church surveillance is inevitable. Imagine what the police response would have to be to a reliable report that Plaintiff Wilkins wore a gun to worship services or kept a gun in his Tabernacle office.[4] In the former example, a law enforcement agency would have to attend worship services (with or without a warrant) to investigate. In the latter example, the agency would have to apply for a warrant to search Plaintiff Wilkins' Tabernacle office. Execution of the search warrant could easily result in disruption of Tabernacle activities, destruction of Tabernacle property and invasion of confidential or sacred interests – all in the name of finding property that is not in and of itself contraband and possession of which is constitutionally protected.

Moreover, the Church Carry Ban turns the internal operations of a church into a public matter (by declaring what conduct cannot be done within a church when

[4] There is no exception in O.C.G.A. § 16-11-127(b)(4) for a place of business or a private property owner to exercise his right to bear arms in the confines of his office. There is no exception even for times during which the congregation is not assembling, and Plaintiff Wilkins is alone.

precisely the same conduct is permitted outside a church). "[A state] cannot make public the business of religious worship or instruction, or of attendance at religious institutions of any character." *Lemon,* 403 U.S. at 633. Any efforts by Defendants to enforce the Church Carry Ban would violate this premise.

"[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers…. State power is no more to be used so as to handicap religions than it is to favor them." *Lemon,* 403 U.S. at 656. The Church Carry Ban is not neutral as between believers and non-believers. The believers, who presumably visit places of worship more frequently than do non-believers, are more heavily restricted in their rights to bear arms for self-defense. In this regard, religions are handicapped by the Church Carry Ban.

While it is true that Plaintiffs do not assert that their religious ***beliefs*** require them to carry guns to "places of worship,"[5] neutrality requires more than just non-interference with activities that are themselves religious:

> [T]he exercise of religion often involves not only belief and profession but the performance of … physical acts[such as] assembling with others for a worship service…. It would be true, we think, … that a State would

[5] Although there are certainly exceptions, such as the Sikh Kirpan (literally weapon of defense). *See, e.g., Gurdev Kaur Cheema v. Harold Thompson*, 67 F.3d 883 (9th Cir. 1995) (overturning ban on weapons in school as applied to Sikh child carrying the required Kirpan, with some narrowly tailored restrictions).

> be prohibiting the free exercise of religion if it sought to ban such acts only when they are engaged in for religious reasons.

Employment Division v. Smith, 494 U.S. 872, 878 (1990).

Applying this concept to the case at bar, Georgia punishes carrying firearms in places where people are assembling with others for a worship service, but there is no such punishment for carrying firearms in places where people work, shop, or recreate. In other words, Georgia does not punish carrying a firearm in places where people assemble with others for secular purposes. Only a religious purpose to the assembly brings out the police power of the state. While the state may compel obedience to a "valid and neutral law of general applicability," (*Id.*, at 880), the law at issue is neither neutral nor generally applicable. The law is no more constitutional than would be a law prohibiting the wearing of black shoes to church when the general law said nothing about wearing black shoes out in public. It does not matter that wearing shoes is itself a secular activity and not required by the tenets of a religion. A secular activity that is restricted only when conducted in a religious context burdens the free exercise of religion. Such a law is not neutral. It burdens religiously motivated conduct while exempting the same conduct that is not religiously motivated.

"Government action is not neutral and generally applicable if it burdens

…religiously motivated conduct but exempts substantially comparable conduct that is not religiously motivated." *McTernan v. City of York*, 564 F.3d 636, 647 (3rd Cir. 2009). The Third Circuit also has interpreted *Church of Lukumi Babalu Aye* to mean that a law is not generally applicable "if it proscribes particular conduct only or primarily religiously motivated." *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). While there may be some secular reasons why a person would go to a place of worship, Defendants cannot reasonably dispute that going to a place of worship is primarily religiously motivated, and therefore the challenged Georgia law is not neutral.

"When a law that burdens religion is not neutral or not of general application, strict scrutiny applies and the government action violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *McTernan*, 564 F.3d at 647. Defendants cannot possibly articulate a compelling government interest in burdening religion in this way. The policy of leaving worshippers defenseless against aggression or persecution is unconscionable. There can be no governmental interest in either burdening or favoring religion. Even if such an interest existed, disarming all who enter a place of worship, indiscriminately, is not a tailored measure at all, and certainly is not a narrowly tailored one.

IB. The Church Carry Ban Infringes the Second Amendment

The Second Amendment provides, "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Supreme Court of the United States has declared the rights guaranteed by the Second Amendment to be fundamental. *District of Columbia v. Heller,* 128 S.Ct. 2783, 2798 (2008) ("By the time of the founding, the right to have arms had become fundamental…."). The *Heller* court also declared the right to keep ***and bear*** arms to be "an individual right to possess weapons in case of confrontation." *Id.* at 2797. The fundamental nature of the right, as it applies to the states, was reiterated by the Court in *McDonald v. City of Chicago,* 561 U.S. ___, Slip Opinion at 31 (June 28, 2010) ("In sum, it is clear that the framers and ratifiers of the Fourteenth Amendment counted the rights to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")

The Supreme Court of the United States has not announced a standard of review for evaluating infringements on the Second Amendment, but it has declared that rational basis is not appropriate. *Heller,* 128 S.Ct. at 2818. The appropriate standard, therefore, is either intermediate scrutiny or strict scrutiny. Because the

Church Carry Ban cannot survive either level of scrutiny, Plaintiffs will discuss the application of the lower standard, intermediate scrutiny first. For the sake of completeness, Plaintiffs also will discuss the application of strict scrutiny.

Under intermediate scrutiny, Defendant's actions must "directly advance a substantial governmental interest and be no more extensive than is necessary to serve that interest." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 176 L.Ed.2d 79, 94; 2010 U.S. LEXIS 2206, 36 (2010). The Church Carry Ban does not advance a governmental interest at all, let alone a substantial one. Defendants can have no interest in disarming and leaving defenseless citizens who choose to attend a place of worship.

Even assuming *arguendo* that the Church Carry Ban actually serves some interest (by applying the illogical fiction that a disarmed person is safer than an armed person), a ***total ban*** on firearms in places of worship cannot possibly meet the test of being "no more extensive than is necessary to serve that interest." The law makes no provisions, for example, for firearms owned by the place of worship itself, or for employees of the place of worship. It has no exceptions for when church leaders might be counting cash from the day's contributions or leaving late at night in a dangerous neighborhood after locking the building. Instead, the law completely strips

the place of worship -- private property as a matter of constitutional necessity -- of all control of its property with respect to firearms, and it strips all who worship and work there of their fundamental, inherent right to self defense in case of confrontation.

Under strict scrutiny, Defendants must show that their challenge law is narrowly tailored to advance a compelling governmental interest. *See McTernan* above. Defendants cannot make that showing. First, there is no governmental interest, compelling or otherwise, in regulating behavior in a place of worship when the behavior is "authorized" elsewhere in the state. Even if there somehow were such an interest, a blanket prohibition on the carrying of firearms cannot possibly be "narrowly tailored" in any sense of the phrase.

II. Plaintiffs Are Suffering Irreparable Harm

As shown in their Verified Complaint, Plaintiffs would like to exercise both their First and Second Amendment rights, but they are deterred from doing so because of the fear of arrest and prosecution. *See* Complaint, ¶¶ 14, 24, and 25. The presence of the Church Carry Ban thus has a chilling effect on Plaintiffs' exercise of their fundamental constitutional rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "It is well settled that the loss of First Amendment

freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Cate v. Oldham,* 707 F.2d 1176, 1188 (11th Cir. 1983), *citing Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981).

III. Defendants Would Not be Damaged By an Injunction

The third prong of the four-part test for a preliminary injunction is that the threatened injury to Plaintiffs (if the injunction is not granted) outweighs the damages to Defendants (if the injunction is granted). The injunction Plaintiffs seek, to prevent Defendants from enforcing the Church Carry Ban, would ***save*** Defendants money if it were granted. Relieved of the burden of spending money attempting to enforce the unconstitutional Church Carry Ban, Defendants could avoid that expense. There is no reason to believe Defendants would incur any expense or suffer any damages as a result of the requested injunction.

On the other hand, Plaintiffs have shown that they have suffered and are continuing to suffer irreparable harm in the form of the inability to exercise their fundamental constitutional First and Second Amendment rights. The harm to them far outweighs the (nonexistent) damages to Defendants. Thus, this third prong also resolves in favor Plaintiffs.

IV. There is No Public Interest in Violating Plaintiffs' Constitutional Rights

The fourth and final prong of the test is that the injunction would not be adverse to the public interest. There is, of course, no public interest in depriving Plaintiffs' of their constitutional rights. The public's interest is in seeing that the government does not infringe on the rights of the people by enacting and enforcing unconstitutional laws. Thus, the public interest is served by the grant of the injunction.

Conclusion

The Church Carry Ban infringes on Plaintiffs' First and Second Amendment rights. Those infringements are causing irreparable harm to Plaintiffs, and there is no burden to Defendants in being enjoined from enforcing the Ban during the pendency of this action. Plaintiffs therefore respectfully request that an interlocutory injunction be issued without delay, enjoining Defendants from enforcing the Church Carry Ban.

/s/ John R. Monroe
John R. Monroe
Attorney for Plaintiff
9640 Coleman Road
Roswell, GA 30075
678-362-7650
770-552-9318 (fax)

State Bar No. 516193

CERTIFICATE OF SERVICE

I certify that I filed the foregoing on August 19, 2010 using the ECF system, which will automatically send a copy via email to:

Laura L. Lones
Department of Law, State of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
llones@law.ga.gov

I further certify that I served the foregoing on August 19, 2010 via U.S. Mail upon:

J. Edward Trice, Jr.
Mallory & Trice, LLP
P.O. Drawer 832
Thomaston, Georgia 30286

/s/ John R. Monroe
John R. Monroe